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Supreme Court, U.S.
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No. 04-218

IN THE

Supreme Court of the United States

ERIC RODRIGUEZ, *et al.*,

Appellants,

v.

GEORGE E. PATAKI,
Governor of the State of New York, *et al.*,

Appellees.

On Appeal From The United States District Court for the Southern District of New York

MOTION TO AFFIRM

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QUESTIONS PRESENTED

1. Whether the district court erred in rejecting Appellants' one-person, one-vote challenge to the New York State Senate redistricting plan, where: the plan's minor population deviations were required to serve the traditional redistricting principles of avoiding contests between incumbents and preserving the cores of prior districts; Appellants did not allege that the deviations were part of a partisan or racial gerrymander; and Appellants alleged "regional discrimination" but were unable to identify a cognizable region, show cognizable harm, or provide evidence of animus against any geographic area.

2. Whether the district court erred in denying Appellants' motion to compel only insofar as the motion sought production of confidential legislative documents that are wholly irrelevant to Appellants' claims.

3. Whether the district court erred in limiting the deposition of an expert witness to matters encompassed by his expert report, where the same person was deposed as a fact witness and the court did not order restrictions on the fact depositions of this or any other witness.

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COUNTERSTATEMENT OF THE CASE

Following the release of the 2000 census results, New York State's Legislative Task Force on Demographic Research and Reapportionment ("LATFOR") held public hearings throughout the State and received written comments and proposals from the public regarding State Senate, Assembly, and congressional districts. J.S. 6a-7a. LATFOR then released an initial set of proposed plans, held a second round of public hearings, received additional public input, and transmitted its final set of proposed plans to the Legislature. *Id.* In April 2002, the Legislature and the Governor enacted legislation containing new Senate and Assembly districts, which were almost identical to LATFOR's proposals. J.S. 10a. In June 2002, the Legislature and the Governor enacted new congressional districts, and the United States Department of Justice "precleared" the three new plans under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. J.S. 12a-13a.

"[T]he 2002 Senate Plan reflects traditional districting principles including: maintaining equality of population, preserving the 'cores' of existing districts, preventing contests between incumbents, and complying with the requirements of the Voting Rights Act." J.S. 3a.

Under the 2002 Senate Plan, the maximum population deviation between two districts is 9.78% of the ideal district size, and, on average, a district's population deviates from the ideal size by 2.22%. J.S. 25a. More than half of all post-2000-census state legislative plans, including some court-drawn plans, have maximum deviations above 9%; of these 54 plans, only one has a lower average deviation than the challenged plan. Mot. to Affirm Appendix ("App.") 5a-6a.

As a result of the New York Constitution's "block-on-the-border" and "town-on-the-border" rules, the 2002 Senate Plan contains three groups of contiguous districts, within which all districts have similar population deviations. Districts 1-9 (covering Nassau and Suffolk Counties) have

virtually zero deviations; Districts 10-38 (covering New York City, Rockland County, and portions of Westchester and Orange Counties) are slightly overpopulated; and Districts 39-62 (covering the remainder of the State) are slightly underpopulated. J.S. 270a. The "block-on-the-border" and "town-on-the-border" rules cause this pattern because they result in virtually perfect population equality among districts within the same county, as well as among districts in adjacent counties that share a district.[1]

Much of the State's population growth during the 1990's was within New York City and, accordingly, the 2002 Senate Plan provides the City with one more Senate district than under the prior plan. Because the Legislature increased the size of the Senate from 61 to 62 seats,[2] the Plan accommodates the City's growth without reducing the

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[1] The state constitution provides that the population difference between two adjoining districts within the same county cannot exceed the population of a block (or town) on the border between the two districts. N.Y. Const. art. III, § 4. In other words, if the population difference can be reduced by shifting a border block (or town) from one district to another, then the block (or town) must be shifted. Where the blocks (or towns) are small, this rule results in nearly perfect population equality between two adjacent districts in the same county. And, because all districts within a county are contiguous, there is a "ripple effect" that results in virtual population equality among all districts in the county. In addition, where a district straddles a county line, the rule applies with respect to adjacent districts in *both* counties. As a result, the adjacent districts in *both* counties have the same population as the two-county district. Ultimately, due to the ripple effect, *all* districts in the two counties have essentially equal population. App. 6a-7a. In the 2002 Senate Plan, four of the five contiguous counties comprising New York City have cross-county districts, and the 21 districts in this area have populations that differ by no more than six people. J.S. 270a.

[2] As LATFOR's website noted, the state constitution contains a formula for determining the size of the Senate. N.Y. Const. art. III, §§ 3, 4. The Legislature is "accorded some flexibility in working out the opaque intricacies of the constitutional formula." *Schneider v. Rockefeller*, 31 N.Y.2d 420, 432, 293 N.E.2d 67, 74, 340 N.Y.S.2d 889, 899 (1972).

number of districts elsewhere in the State. The Legislature thereby avoided the substantial reconfiguration that would have been required by the elimination of a prior district. As a result, "the Senate Plan did apply the accepted principle of maintaining the core of districts" throughout the State. J.S. 34a n.34. In addition, the Legislature avoided a contest between incumbents, which would have been required if one of the prior districts had been eliminated. The Plan "has only two incumbent pairings" and "thus reflects a legitimate effort to avoid incumbent pairs."[3] J.S. 29a n.30.

In January 2003, Appellants and Plaintiff-Intervenors filed a nine-count amended complaint.[4] The one-person, one-vote count did not allege that the minor population deviations in the challenged plan reflected intentional race discrimination. J.S. 27a & n.29. Appellants also did not assert a Fourteenth Amendment "partisan gerrymandering" claim, J.S. 30a-31a n.31, or otherwise allege that partisan considerations impermissibly affected the 2002 Senate Plan. Instead, Appellants claimed that the population deviations of the Plan resulted from "regional discrimination." The allegedly disadvantaged "downstate" region consisted of the slightly overpopulated Districts 10-38, which covered New York

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[3] The 2002 Senate Plan also markedly improved the voting strength of New York's minority voters. The Plan includes two more majority-Hispanic voting-age population ("VAP") districts and one more majority-African-American VAP district than the prior plan. Of the 62 districts in the 2002 Senate Plan, eight are majority-African-American VAP, six are majority-Hispanic VAP, four additional districts are majority-minority VAP, and one is majority-white VAP with an African-American incumbent. J.S. 126a n.134.

[4] Appellants claimed that the Plan violated the Fourteenth Amendment's one-person, one-vote requirement; that the Plan violated Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, by failing to include three more minority "coalition" or "influence" districts; and that the Plan's only majority-*white* district in Bronx County violated the Fourteenth Amendment under *Shaw v. Reno*, 509 U.S. 630 (1993), and its progeny.

City, half of Westchester County, all of Rockland County, and two towns in Orange County. Appellants gave no basis—*e.g.*, no set of common interests—for defining this area as a "downstate" region; their definition is based on nothing more than the fact that the area corresponds to the slightly overpopulated districts. J.S. 18, 31a.

Attached to the complaint was Appellants' revised proposed redistricting plan. Whereas Districts 10-38 in the 2002 Senate Plan are all slightly overpopulated, Districts 10-38 in Appellants' plan are all slightly underpopulated.[5] App. 1a-4a. This difference reflects the fact that Appellants' plan eliminates an "upstate" district and adds a new "downstate" district, *in addition to* the new "downstate" district already created through the increase of the Senate size to 62 seats.

By eliminating an "upstate" district, Appellants' plan necessarily creates a contest between two incumbents. The shift also destroys a prior district and requires substantial changes to the surrounding districts. Moreover, Appellants' plan creates rather than eliminates inequalities between "regions." Under the 2002 Senate Plan, the slight overpopulation of "downstate" is offset by the slight underpopulation of Assembly districts in the same area.[6] In

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[5] Appellants assert that, in the challenged plan, "every single downstate district is *substantially* overpopulated." J.S. 2 (emphasis added). In fact, 21 of the 29 "downstate" districts deviate from the mean by only 1.69 or 1.70%, which is only a hair above the 1.24% deviations of Appellants' plan. J.S. 270a. Seven of the eight other "downstate" districts with higher deviations are in Queens, and it is impossible to achieve lower deviations without drawing a district that crosses the county border, in violation of the whole-county policy embodied in the state constitution. N.Y. Const. art. III, § 4. Moreover, since Appellants misleadingly label the Queens districts as having deviations from "4% to 8%" (J.A. 8), it bears emphasis that *no* district deviates from the mean by 5% or more.

[6] New York City has 25.6 (41.3%) of 62 Senate seats and 65 (43.3%) of 150 Assembly seats. Thus, the City, with 42.2% of the State's population, has 42.7% of seats in the Legislature as a whole (42.3% of the Legislature if Senate seats are given greater weight). App. 18a-20a.

addition, New York City has 26 Senate seats (as opposed to 26.2 seats under a perfectly populated plan), "with a seat defined as representing a district controlled or predominantly controlled by city-based voters." J.S. 31a-32a. And New York City districts are substantially *under*populated in terms of eligible and enrolled voters. *See infra* p. 11. Appellants' plan's underpopulation of Districts 10-38, by contrast, would *exacerbate* the underpopulation of comparable Assembly districts; cause *greater* disproportionality between the number of New York City Senate seats (27) and the City's share under a perfectly populated plan (26.2); and *increase* disparities between "regions" in terms of eligible and enrolled voters. App. 9a, 15a, 17a, 19a-20a.

In March 2003, Appellees filed a partial motion to dismiss based upon, among other things, the fact that the Plan's maximum population deviation is less than 10%. The district court denied the motion to dismiss in its entirety.

In July 2003, Appellants moved to compel the production of documents by Appellee Joseph L. Bruno, the Senate Majority Leader. Senator Bruno had appeared in the case only after Appellants served him with a summons and complaint in early 2002. He had made a voluminous document production in response to discovery demands, while asserting privilege over those documents that reflected communications and deliberations of legislators and their aides. The magistrate judge ruled that, under federal common law, legislative privilege is a qualified privilege governed by a five-part balancing test. J.S. 198a-199a. Whereas Senator Bruno objected to the magistrate's rejection of an absolute privilege, Appellants did *not* challenge the magistrate's recognition of a qualified privilege. The district court affirmed the magistrate's order but reiterated the magistrate's emphasis that the order "does not relate to 'any depositions of legislators or their staffs.'" J.S. 209a.

Based on the guidelines set forth in the magistrate's original order, Senator Bruno produced hundreds of

additional documents while maintaining the assertion of privilege over a limited category. The magistrate then inspected the documents *in camera* and ordered the production of *all* documents except for those that were "akin to private discussions among legislators or between individual legislators and their aides" and, in all events, would have "add[ed] nothing to the discussion of the legality of the Senate majority's final plan." J.S. 213a, 214a. (The magistrate *did* compel the production of documents that reflected private legislative communications but were potentially helpful to Appellants' case.) Appellants objected neither to the magistrate's continued application of qualified privilege nor to his document-specific relevance determinations; instead, they maintained that the five-part balancing test required disclosure of *all* documents related to the specific districts they challenged. App. 38a-39a. Appellants also made a "waiver" argument (almost twenty months into the lawsuit and only ten days before the close of discovery), premised on a notion that Senator Bruno had voluntarily participated in the lawsuit by complying with Appellants' summons and then following the Federal Rules. In addition, Senator Bruno filed objections to the magistrate's order requiring production of additional documents. The district court affirmed. J.S. 228a-230a.

With respect to depositions, there was no order from the magistrate, and certainly no order affirmed by the district court, barring depositions of legislators, their aides, or any other fact witness. J.S. 1, 183a-232a. But Appellants did not depose any of these individuals, except for Mark Burgeson, "the primary drafter of the Plan." J.S. 10. In fact, their *only* unsuccessful argument as to depositions was that Mr. Burgeson, in his capacity as an expert on the Plan's *objective* characteristics, could be questioned regarding his and others' *subjective* thought processes in developing and enacting the Plan. App. 46a-47a. Although the magistrate and district court rejected Appellants' argument about Mr. Burgeson's *expert* deposition, there was no order or objection regarding

the scope of questioning at Mr. Burgeson's *fact* deposition, where Appellants were given wide latitude.

The district court granted Appellees' motion for summary judgment on several counts, including the one-person, one-vote claim. After trial on the remaining claims, the court entered judgment for Appellees on all counts.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY FOUND THAT THE MINOR DEVIATIONS OF THE CHALLENGED PLAN ARE JUSTIFIED BY TRADITIONAL REDISTRICTING POLICIES AND ARE NOT ATTRIBUTABLE TO IMPERMISSIBLE FACTORS

Although Appellants struggle mightily to suggest that the court below applied an erroneous legal standard, the truth is that Appellants lost precisely and only because the undisputed evidence showed that they were unable to prove facts in support of their own legal theory. The district court *adopted* the legal framework advanced by Appellants. It held that a less-than-10% population deviation is *not* a safe harbor from a one-person, one-vote claim,[7] and that such a challenge will succeed if the plaintiff demonstrates that the deviations are actually attributable to an impermissible purpose. J.S. 21a-25a. This approach was identical to that of the district court in *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga.), *aff'd*, 124 S. Ct. 2806 (2004), which Appellants hold up as the proper legal standard. As the court below made clear, in expressly distinguishing *Larios* on its facts,

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[7] This Court has held that "minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case . . . under the Fourteenth Amendment so as to require justification by the State." *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973). "[A]s a general matter, . . . an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations." *Brown v. Thomson*, 462 U.S. 835, 842 (1983).

the only reason for the differing results is that, unlike the *Larios* plaintiffs, Appellants could not show that the population deviations were attributable to anything but traditional districting principles. J.S. 29a n.30, 34a n.34. Appellants offered no evidence that any aspect of the challenged plan was based on an impermissible or illegitimate purpose, much less that such a purpose—rather than the pursuit of legitimate redistricting principles—actually caused the population deviations at issue. The district court's fact-bound decision was correct, and it certainly presents no substantial question warranting this Court's plenary review.

A. Appellants' Claim of "Regional" Discrimination Would Fail If Such Claims Were Cognizable

Contrary to what their jurisdictional statement implies, the only allegedly impermissible motive that Appellants set out to prove was so-called "regional" or "geographic" discrimination. There is no contention or proof, for example, that the minor deviations were adopted to further an unlawful partisan gerrymander (under *any* definition of that concept), or were based on race discrimination. *See* J.S. 26a-27a & n.29, 30a-31a n.31. (Nor could there be such a contention, since it is undisputed that the plan provides equal treatment to *all* residents—minority and white, Democrat and Republican—within each alleged "region.") As explained below, moreover, there is no proof that the population deviations were attributable to alleged regional "animus." J.S. 22. To the contrary, the deviations concededly served the traditional districting principles of avoiding incumbent pairs and preserving existing district cores, as well as *minimizing* voter inequality. The plan here, therefore, plainly would satisfy *any* standard for determining the validity of minor population deviations—*i.e.*, those under 10%. For this reason, it is difficult to conceive of a worse vehicle for resolving the question of whether and when deviations below 10% constitute Fourteenth Amendment violations.

Nor can the case even shed general light on what, if anything, constitutes impermissible "regional discrimination." Under the undisputed facts, Appellants' hypothesized region is not an identifiable region; the votes of persons in the allegedly disadvantaged region are worth *more* than others in the State; and, to the extent that it is relevant, the region has proportional representation in the state legislature. Needless to say, a regional discrimination claim, whatever its legal merit in the abstract, cannot succeed unless there is a definable region and there is some discrimination.

1. Appellants' Definition of the Allegedly Disadvantaged "Region" Is "Self-Serving and Defective"

Importantly, Appellants do not challenge the accuracy of the district court's conclusion that their definitions of the "upstate" and "downstate" regions were "self-serving and defective" and "tailored to suit [Appellants'] litigation strategy." J.S. 18, 31a. Appellants claimed below that their "downstate" corresponded closely with New York City and its environs, but, in fact, their facially gerrymandered "downstate" excluded the two counties immediately to the east of the City on Long Island (Nassau and Suffolk Counties), included only half of the county immediately to the north of the City (Westchester County), veered abruptly across the Hudson River to include a county that is separated from the City by northeastern New Jersey (Rockland County), and proceeded northwest to pick up two towns in another rural county (Orange County) that has nothing in common with the City. J.S. 8. Thus, Appellants' hypothesized "downstate" region stretches to the Pennsylvania border and includes rural counties, but excludes all or half of each county that actually borders New York City. Moreover, contrary to Appellants' claim, there is no allegation or proof that the Plan contains "a built-in bias against voters living in the State's more populous counties." J.S. 16 (quoting *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 653-

54 (1964)). To the contrary, all of the most populous counties outside of the City—Nassau, Suffolk, Westchester, and Erie (J.S. 267a)—are either *underpopulated* in part or whole or have districts with perfectly equal population.

Accordingly, Appellants now concede the district court's point that geographic areas are not "classified as 'downstate' [by Appellants] on any basis other than that they are overpopulated." J.S. 31a; *see* J.S. 18 (terms "upstate" and "downstate" were "used only as a shorthand description of the geographic areas that . . . [are] under- and over-populate[d]" in the challenged plan). Appellants plainly are incorrect when they assert (J.S. 18) that it is "absurd" to require a "region" to be defined by something more than geography corresponding with overpopulated legislative districts. Needless to say, if a "region" can be defined solely by overpopulated territory, then *any* plan with overpopulated districts—*i.e.*, any plan with less than perfect population equality—would contain an overpopulated "region" that is the product of "regional" discrimination vis-à-vis the underpopulated districts/"region." The lower court was thus quite correct to dismiss Appellants' completely circular and meaningless concept.

In this regard, Appellants repeatedly emphasize the so-called "systematic" nature of the overpopulation in the challenged plan—*i.e.*, the fact that the overpopulated districts are contiguous instead of scattered throughout the State. But it is undisputed that, far from suggesting any sort of "regional" animus, this "pattern" is simply a function of the New York Constitution's "block-on-the-border" and "town-on-the-border" rules, which require that districts within a county, as well as districts in adjacent counties that share a district, have almost precisely the same population. *See supra* p. 2. Thus, if one district in an area where districts cross county lines is overpopulated, then all districts in that area must be overpopulated to the same extent. This phenomenon is exemplified by *Appellants' own* proposed alternative plan, which contains precisely the same "pattern,"

only in reverse, with every so-called "downstate" district *under*populated instead of overpopulated. App. 1a-4a.

Of course, the fact that the New York Constitution causes similar population patterns in large groups of *contiguous* districts is of no federal constitutional moment. The rights and voting strength of citizens in overpopulated districts is not affected in any way by whether the underpopulated districts are nearby, or far away.

2. Appellants Are Unable to Show Any Disproportionality

The undisputed facts established that persons in the allegedly disadvantaged "downstate" region had *greater* voting strength than in "upstate" and thus were *favored* under the 2002 Senate Plan. As the court noted, "both parties stipulate that the New York City districts . . . [are] substantially *underpopulated* rather than overpopulated" in terms of eligible voters (citizen voting-age population) and registered voters. J.S. 32a. "According to the *plaintiffs'* CVAP figures, the New York City districts in the Senate Plan are *underpopulated* by 12.0% and 'upstate' districts are *overpopulated* by 15.4%. With respect to registered voters, the weight of one New York City resident's vote, depending on the district of comparison, is worth 29.9% to 63.6% *more* than an 'upstate' citizen's vote." *Id.* (emphasis added). Thus, the "practical effect of the Senate Plan . . . is to dilute the votes of '*upstate*' residents, *not* those who reside 'downstate.'" *Id.* (emphasis added).

In the face of this stark showing of *enhanced* voting strength in "downstate," Appellants' only response is that "the Legislature reapportioned on the basis of *total* population" and that the Fourteenth Amendment "protects 'persons,' not merely voting age citizens." J.S. 18, 19 (emphasis in original). That is, of course, true, but entirely irrelevant. The right afforded to "persons" under the Fourteenth Amendment in the "one-person, one-*vote*" context is, of course, "the right of all qualified *citizens* to

vote." *Reynolds v. Sims*, 377 U.S. 533, 554 (1964) (emphasis added). The Constitution thus requires "that the *vote* of any *citizen* [be] approximately equal in weight to that of any other *citizen* in the State." *Id.* at 579 (emphasis added); *see also id.* at 568 ("[A]n individual's right to *vote* for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with *votes* of *citizens* living in other parts of the State." (emphasis added)). Indeed, the cases on which Appellants rely—including, most notably, *Larios*—speak in terms of the under-weighting of *votes*. *See, e.g.*, *Larios*, 300 F. Supp. 2d at 1337; *WMCA*, 377 U.S. at 653. (In *Larios*, unlike here, the same region was slightly overpopulated in terms of total population and *more* overpopulated in terms of eligible and enrolled voters. *See* Motion to Affirm at 19, *Cox v. Larios*, No. 03-1413 (filed May 13, 2004).)

Thus, if a plan *enhances* the weight of a "person's" vote relative to other districts, then the person has suffered no cognizable constitutional harm. Equality of total population—the most readily available statistic—is commonly used only as a rough *proxy* for voting equality, and the Court has emphasized that precise equality of total population is not required because, among other reasons, total population is not "a talismanic measure of the weight of a person's vote." *Gaffney*, 412 U.S. at 746; *see also id.* at 746-47 ("The proportion of the census population too young to vote or disqualified by alienage or nonresidence varies substantially among the States and among localities within the States."). For example, in *Burns v. Richardson*, 384 U.S. 73 (1966), the Court upheld the use of a plan with *substantial* deviations in total population (Oahu had 79% of Hawaii's population and elected 71% of the state house). *Id.* at 82. These deviations were not problematic because "[t]otal population figures may . . . constitute a substantially distorted reflection of the distribution of state citizenry." *Id.* at 94. And, in terms of citizens and registered voters, there was no substantial inequality. *Id.* at 82, 96.

As this reflects, Appellants' true complaint is not about the voting equality of persons residing in "downstate," but is based on some perceived constitutional right to "proportional representation" of "downstate" Senators in the state legislature—*i.e.*, the percentage of "downstate" Senate seats must be equivalent to the percentage of population in "downstate." The Fourteenth Amendment does not, of course, vest any "region" with any right of proportional representation: "Legislators are elected by voters, not farms, or cities or economic interests." *Reynolds*, 377 U.S. at 562. But even if proportional representation of "cities" or "regions" was within the comprehension of the Fourteenth Amendment, New York City is provided with nearly perfect proportional representation in the Senate and is *over*-represented in the state legislature. As the district court emphasized, New York City would receive 26.2 seats if every district were apportioned with perfect equality, and it receives 26 seats under the 2002 Senate Plan.[8] J.S. 31a-32a. Moreover, when representation in the New York State

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[8] Appellants do not dispute that districts "controlled or predominantly controlled by city-based voters" must be treated as New York City districts for purposes of any proportionality analysis. J.S. 31a-32a. Instead, they claim that "the record contain[s] no evidence whatsoever" to support the district court's treatment of two of the seats as controlled or predominantly controlled by city-based voters. J.S. 19 n.11. On the contrary, it is undisputed that New York City is home to 78% of the residents in these districts. App. 8a-9a. Even more bizarre is Appellants' assertion that "the drafters of the Plan purposefully siphoned 135,000 residents from Westchester" into these two districts. J.S. 19 n.11. Two highly technical memoranda, upon which Appellants exclusively rely, show merely that the drafters faced a choice between the challenged configuration (with about 135,000, or 22%, of these two districts' residents living in Westchester) and alternative configurations in which about 131,000, or 21%, of these two districts' residents would have lived in Westchester. J.S. 277a-278a, 281a-282a. There is no merit to Appellants' apparent assertion that predominant control of these districts shifted out of New York City when they were drawn to be 78% in the City (on average) instead of 79%.

Assembly is considered, as it must be,[9] New York City is *over*-represented in the Legislature as a whole, even in terms of total population.[10] *See supra* p. 4 n.6.

Consequently, the undisputed facts show that there is neither a cognizable "region" nor any disproportionality to support Appellants' claim of "regional discrimination."

B. It is Undisputed That the Challenged Deviations Are Necessary to Comply With Legitimate Redistricting Principles

At bottom, Appellants are left trying to transform a simple statistical *effect*—that certain contiguous districts have more population than others—into a showing that the *purpose* of the population deviations was to create this allegedly adverse effect. As the district court stated, however, "the plaintiffs only beg the question in repeatedly asserting that the pattern of overpopulation and underpopulation 'reflects an illegitimate effort to overrepresent an entire region of the State in order to maintain its ascendancy in the Senate, at the expense of another large region which the 2000 Census data showed had grown much more substantially over the past decade.'" J.S. 30a. The question begged by Appellants' assertion is: Do the population differences between the so-called "regions" stem from regional animus, or were the deviations related to one or more legitimate redistricting principles? In this regard, Appellants seem to think it

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[9] *See Reynolds*, 377 U.S. at 577 (An "apportionment in one house could be arranged so as to balance off minor inequities in the representations of certain areas in the other house."); *Maryland Comm. for Fair Representation v. Tawes*, 377 U.S. 656, 673 (1964) (The "indispensable[] subject for judicial focus in a legislative apportionment controversy is the overall representation accorded to the State's voters, in both houses of a bicameral legislature.").

[10] Again, the situation was the opposite in *Larios*, where the disadvantaged region was under-represented in both houses of the legislature. *See* 300 F. Supp. 2d at 1327, 1342.

enough to establish that the deviations were not inadvertent; thus, their repeated refrain that the deviations were "deliberate." J.S. i, 2, 9, 10, 11, 13, 17, 18, 21, 24. The question, of course, is not whether the Plan resulted from a cognitive act, but whether the purpose of that deliberate act is to harm a certain region or to further legitimate principles.

As is clear from the decision below and confirmed by the jurisdictional statement, Appellants do not dispute that the challenged deviations were *required* in order to further at least two redistricting principles approved by this Court as satisfying even the far more stringent requirements for *congressional* districts[11]: "preserving the cores of prior districts, and avoiding contests between incumbent [r]epresentatives." *Karcher v. Daggett*, 462 U.S. 725, 740 (1983).[12]

The plan that Appellants say the Legislature "easily could have drawn" (J.S. 9) would have overpopulated the "upstate" instead of the "downstate" and, in the process, removed an entire district from the "upstate" and transplanted it into the

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[11] *See, e.g., White v. Regester*, 412 U.S. 755, 763 (1973) ("It is plain . . . that state reapportionment statutes are not subject to the same strict standards applicable to reapportionment of congressional seats."); *Karcher v. Daggett*, 462 U.S. 725, 732-33 (1983).

[12] It is also undisputed that the slightly greater (albeit minor) deviations in the Queens districts were *required* to keep Queens County whole—that is, to avoid having a district that straddled the Queens County border. *See, e.g., Karcher*, 462 U.S. at 740 ("respecting municipal boundaries" is a legitimate legislative policy); N.Y. Const. art. III, § 4 (articulating state policy of respecting county borders). Appellants have it backwards when (J.S. 23) they cite *Kilgarlin v. Hill*, 386 U.S. 120 (1967), for the proposition that respect for county boundaries is irrelevant, merely because Appellants' revised plan (but not their original plan) preserved one more whole county statewide. *Kilgarlin* makes clear that the preservation of county lines must be "relate[d] [to] . . . specific inequalities among the districts." 386 U.S. at 124. Accordingly, the relevant point is that lower deviations could have been achieved in Queens *only* by crossing the county border.

"downstate," thereby causing the "upstate" to have one fewer district than in the 1990's plan. Obviously, with the same number of incumbents and one fewer district, a contest between incumbents would have been *unavoidable*. The cores of prior districts likewise would have been massively disrupted, by necessity, if a district had been eliminated and the others had been reconfigured to fill the void. The district court correctly relied on these facts in expressly distinguishing *Larios*, where "'core retention was not a concern in the redistricting process,'" and the legislature engaged in "wholesale distortion of district lines throughout the state in order to target and oust members of the minority political party." J.S. 34a n.34 (quoting 300 F. Supp. 2d at 1334).

Appellants do not dispute that, in other cases, deviations as minor as those in the 2002 Senate Plan—and, indeed, many deviations *greater* than 10%—are justified if needed to preserve the cores of prior districts. Appellants nevertheless maintain that preserving the cores of prior districts is not "a legitimate justification for a deliberate effort to nullify Census data." J.S. 24. But *every* plan that deviates from perfect population equality to preserve the cores of prior districts does so precisely to avoid the disruption that would be caused by slavish adherence to the new "Census data" and the resulting creation of new, unfamiliar districts. Thus, *every* departure from perfect population equality to preserve district cores *ipso facto* "nullif[ies] Census data"—to the extent Appellants' pejorative rhetoric is comprehensible at all. Consequently, Appellants' derisive characterization fails to distinguish the legion of cases sanctioning core preservation or to provide a basis for condemning the standard core preservation here.

Indeed, the claim that the challenged plan "nullif[ies] Census data" is especially inappropriate in this case. While preserving the prior districts in the so-called "upstate," the plan reflects the relative population shift from "upstate" to "downstate" by increasing the size of the State Senate from

61 to 62 seats and *adding* the new district to *New York City*. Thus, when confronted with the need to add a district to New York City in order to reflect its population growth, the Legislature chose to create an entirely new district for New York City instead of taking the district from elsewhere in the State, which would have necessitated a contest between incumbents and would have destroyed district cores. Accordingly, the 2002 Senate Plan increases the "downstate" share of Senate seats, commensurate with census figures showing more population growth in that area.

Appellants also concede, as they must, that the slight overpopulation of "upstate" was *required* in order to avoid the incumbent pairing necessitated by the elimination of an "upstate" district, which would have resulted from underpopulating those districts as Appellants proposed. Because the population deviations in "upstate" undisputedly were required in order to avoid an incumbent pair, the 2002 Senate Plan satisfies the very standard proposed by Appellants themselves—*i.e.*, that "a particular objective *required* the specific [population] deviations" at issue. J.S. 24 (quoting *Karcher*, 462 U.S. at 741 (emphasis and alteration added in J.S.)).

Even though avoidance of incumbent pairs indisputably required adoption of the slightly higher deviation alternative and thus satisfied even *Karcher*'s demanding standards, Appellants nonetheless argue that this is somehow not a legitimate justification because the plan as a whole did not achieve *perfection* with respect to the policy of avoiding pairs. That is, avoiding the "upstate" pair was purportedly unjustified because, elsewhere in the State, "two sets of downstate Democratic incumbents were gratuitously paired." J.S. 24. But a plan obviously need not *wholly eliminate* incumbent pairs to rely on that as a legitimate policy justifying deviations, any more than a plan need wholly eliminate divisions of municipalities or counties to invoke that as a justification for slight deviations.

In any event, the undisputed evidence establishes that the Plan minimized incumbent pairs, relative to *all* lower deviation alternatives, to the extent practicable. Appellants' alternative not only resulted in pairing "upstate" incumbents but, overall, had twice as many incumbent pairs as the 2002 Senate Plan, even after Appellants consciously revised the plan in order to minimize incumbent pairs to the extent possible.[13] As the district court noted, "the 2002 New York State Senate Plan has only two incumbent pairings while the Plaintiffs' Revised Plan produces four incumbent pairings." J.S. 29a n.30. Moreover, the only alternative proposed to the *Legislature* for its consideration "paired 20 incumbents, 17 of whom were Republican." J.S. 4a.

As this reflects, there is nothing to Appellants' unsubstantiated assertion that the "downstate" pairs were "gratuitous." To the contrary, *Appellants' own* plan originally paired incumbents in exactly the same areas[14]—presumably because both plans adjusted district lines to create new majority-minority districts. Based on the undisputed evidence, therefore, the challenged plan "reflects a legitimate effort to avoid incumbent pairs." J.S. 29a n.30.

Thus, as the district court correctly noted, this is not remotely like a case, such as *Larios*, where population deviations were used to *create* pairings of 47 incumbents, 37

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[13] The plan attached to Appellants' original complaint paired 14 incumbents. App. 27a. Appellants produced their revised plan, with 8 paired incumbents (J.S. 29a n.30), long after the challenged plan had been enacted and, indeed, almost a year after Appellants filed this case.

[14] *See* App. 27a-28a. In addition, the incumbent pairings in the 2002 Senate Plan do *not* sacrifice the principle of avoiding contests between incumbents because, as Appellants are forced to admit (J.S. 14), the plan left "nearby open seats in both instances," allowing an incumbent to run in the nominally open district. *See* N.Y. Const. art. III, § 7. By comparison, if a district had been removed from the "upstate" to reduce population deviations, there would have been no nearby open seat through which a contest between incumbents could have been avoided.

of whom were Republican. J.S. 29a n.30. (In *Larios*, moreover, the defendants sought to justify the deviations by reference to "incumbency protection" that took the form, not of avoiding incumbent pairs, but of drawing safe districts for Democratic incumbents. 300 F. Supp. 2d at 1329-31.)

In sum, this case involves a state legislature's choice between two types of plans, both with only minor population deviations. The challenged plan's maximum deviation of 9.78% is commensurate with over half of the state legislative plans across the country, and with several *court-ordered* plans, all of which have deviations above 9%. App. 5a-6a. In addition, the Plan's 2.22% average deviation is *lower* than in all but one of the other state legislative plans with greater-than-9% maximum deviations, which means that most state legislative plans have *higher* average deviations than New York's Senate Plan. *Id.* To achieve slightly lower deviations in terms of *total* population, as in Appellants' alternative plan, one necessarily would be providing *less* equality between districts in terms of the weight of individual *votes*, and in terms of overall representation in the bicameral legislature. Adoption of the alternative type of plan also would *require* a contest between incumbents, destruction of the cores of prior districts, and violation of the Queens County border.

In light of these important interests, the enacted plan would plainly be unassailable if the overpopulated districts were scattered among regions. Consequently, Appellants' claim reduces to the absurd proposition that a legitimate plan which serves traditional districting principles somehow becomes improper if the effect falls disproportionately on one "region." Reflecting this confusion, Appellants repeatedly invoke cases making the obvious point that deviations creating stark voting inequality cannot be *justified* on the basis that they were designed to prefer one region. But this does not in any way suggest that a redistricting plan that would be permissible if the overpopulated districts were scattered in a piecemeal fashion among regions somehow

becomes constitutionally impermissible because it happens that the overpopulated districts are grouped in one region. "Regions" have no Fourteenth Amendment rights distinct from the "persons" in them. Thus, a plan that treats persons with sufficient equality to satisfy the Fourteenth Amendment if the overpopulated districts were distant from each other also satisfies the Constitution if the districts are contiguous.

Needless to say, *Larios* did not suggest that regional differences themselves invalidate an otherwise permissible redistricting plan. Instead, *Larios* turned on the fact that the (more significant[15]) deviations in that case, unlike those here, were *not* required to avoid contests between incumbents, to preserve the cores of prior districts, or to comply with any other traditional redistricting principle. In *Larios*, there was "no evidence that the population deviations in the plans were driven by the neutral and consistent application of any traditional redistricting principles." 300 F. Supp. 2d at 1349. Here, there is no evidence that they were driven by anything else.

C. Appellants' Claim That the District Court Applied the Wrong Legal Standard Lacks Merit

In a transparent effort to avoid the undisputed facts of the case, Appellants mischaracterize certain statements by the district court and then claim that the statements articulate an erroneous legal standard. This Court, of course "reviews judgments, not statements in opinions." *Johnson v. De Grandy*, 512 U.S. 997, 1003 n.5 (1994) (internal quotation marks omitted). And here, Appellants cannot prevail under

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[15] Although the total population deviations in *Larios* were under 10%, the average deviations (3.47% and 3.78%) were far higher than in this case (2.22%), the deviations of the two houses of the legislature reinforced rather than offset one another, and the regional disadvantage was *higher* in terms of eligible and enrolled voters, whereas here the weight of votes in the allegedly disadvantaged region is *greater* than in other parts of the State. *See supra* pp. 12-14; 300 F. Supp. 2d at 1326-27.

any conceivable legal standard since the district court found, based on painstaking review, that "the plaintiffs failed to show that the deviation was not caused by the promotion of court-approved state policies," that they had "not produced evidence of irrational or unconstitutionally discriminatory behavior by the Legislature," and that they failed to present even "some evidence that the districting can be traced to impermissible considerations." J.S. 28a, 30a. Indeed, the undisputed facts showed that the 2002 Senate Plan was valid even under the familiar standard for deviations *above* 10%, and Appellants do not suggest that a plan with *lesser* deviations is held to *stricter* standards. Specifically, in this case, it is clear that "the legislature's plan 'may reasonably be said to advance [a] rational state policy.'" *Brown*, 462 U.S. at 843 (quoting *Mahan v. Howell*, 410 U.S. 315, 328 (1973)). Accordingly, questions about whether and to what degree a plan with minor deviations is subject to *more lenient* standards (including whether, contrary to the district court, such plans are immune from one-person, one-vote challenge) are wholly irrelevant.

Even assuming it mattered, there is nothing problematic about the district court's language that Appellants attack. Seeking to erect a cathedral around the word "solely," Appellants claim (J.S. 19) that the court erred in stating: "'[A] plaintiff [can], with appropriate proof, successfully challenge a redistricting plan with a maximum deviation below ten percent. To prevail, though, the plaintiffs have the burden of showing that the deviation in the plan results *solely* from the promotion of an unconstitutional or irrational state policy.'" J.S. 24a-25a (quoting *Marylanders for Fair Representation v. Schaefer*, 849 F. Supp. 1022, 1032 (D. Md. 1994) (three-judge court) (emphasis added below)). Appellants' selective quotation conveniently omits the lower court's clarification in the next sentence: "Thus, the plaintiffs . . . must demonstrate . . . that the asserted unconstitutional or irrational state policy is the *actual reason* for the deviation. *See Karcher*, 462 U.S. at 740-44." J.S.

25a (quoting *Marylanders* (emphasis added below)). A plaintiff must therefore do more than simply point to "minimal[] devia[tions]" and "scant evidence of ill will by district planners" (J.S. 25a); instead, a plaintiff must show that the impermissible purpose was the actual reason for the challenged deviations.

Contrary to Appellants, therefore, the "ab[ility] to pay lip service to various traditional redistricting objectives" (J.S. 20) will not aid defendants unless those objectives were the actual reason for the deviations at issue. In all events, Appellants' entire discussion has a distinct other-worldly quality because, again, the court clearly found that the challenged plan does far better than "pay lip service" to traditional redistricting principles, and that there was no evidence of regional animus (or any other form of ill will) *at all*.

Moreover, the "sole[]" or "actual reason" standard is no more lenient than that used when a plan's deviations are *over* 10%, such that it is presumptively unconstitutional and must be justified by the state. Again, the question in such cases is whether the plan "*may reasonably be said* to advance [a] rational state policy." *Brown*, 462 U.S. at 843 (emphasis added). Thus, even if the "actual" or "sole" reason motivating the legislature was not a rational state policy, the state would still prevail if, objectively, the plan furthered that policy. Under the district court's standard, in contrast, the state would *lose* if the plan objectively furthered a rational state policy, but the sole or actual reason was illegitimate. The district court's standard is certainly no more *lenient* than that used for presumptively unconstitutional deviations and, of course, there is no basis for applying a more rigorous standard to these minor deviations.

As this reflects, the standard for evaluating population deviations is designed to avoid having the federal judiciary "bogged down in a vast, intractable apportionment slough," *Gaffney*, 412 U.S. at 750, and to avoid an amorphous inquiry

into the "motivation" of a multi-member legislature in the highly partisan redistricting context. *Cf. United States v. O'Brien*, 391 U.S. 367, 383-84 (1968) ("Inquiries into [legislative] motives or purposes are a hazardous matter."). Appellants' proposed standard inevitably would plunge the judiciary into just this political thicket and require that all state legislative plans achieve perfect population equality. Specifically, Appellants contend that "'*any taint* of arbitrariness'" condemns *any* population deviations and that partisan motivation "cannot be a legitimate reason for deviating under ten percent." J.S. 19, 21-22 (quoting *Roman v. Sincock*, 377 U.S. 695, 710 (1964) (emphasis added in J.S.)). But, as this Court has noted, "[p]olitics and political considerations are inseparable from districting and apportionment," *Gaffney*, 412 U.S. at 753, and it is always possible to design a plan with perfect population equality. Thus, virtually every plan is invalid under Appellants' syllogism, since all a plaintiff need do is show "partisan" considerations and propose a plan with lesser deviations. Perfectly legitimate plans, serving valid districting principles that would be acceptable if drawn by a neutral redistricting commission, would be condemned because there was a "taint" of politics in their enactment.

In all events, Appellants' discussion of whether politics justifies population deviations is irrelevant here, because Appellants never provided any evidence that the deviations resulted from partisan concerns and, contrary to Appellants' mischaracterization, the district court nowhere said that partisan concerns would justify the deviations, if that had been offered up as a justification.

Appellants blithely assert that "[t]he district court's opinion was premised on the assumption that so long as the total population deviation remains within ten percent, it is permissible for a legislature to deliberately construct districts of unequal size for the purpose of gaining partisan advantage." J.S. 21. In fact, the district court's *opinion* said no such thing, and its *judgment* certainly was not "premised"

on such reasoning. The court recognized that "politics surely played a role in redistricting in New York in 2002—as it does in most every jurisdiction." J.S. 4a. But Appellees never suggested—and the court never entertained the possibility—that "partisanship *justifies*" the population deviations. J.S. 22 (emphasis in original). Nor did they need to, since the population deviations at issue clearly were justified in light of traditional redistricting considerations *other* than politics.

Appellants themselves, moreover, never introduced partisanship as an issue; they chose to rely instead on allegations of regional disproportionality. Specifically, Appellants never suggested that the deviations somehow reduced Democratic representation, that the overall result of the redistricting was unfair or cognizable under *Davis v. Bandemer*, 478 U.S. 109 (1986), that Democrats and Republicans in the same region were treated differently with respect to population (or anything else), or that district lines were ungainly. In short, Appellants did not present anything analogous to the showing in *Larios*, or anything else to demonstrate that the deviations' purpose and effect was identifiable partisan gain.

Appellants' one feeble effort in this regard was to hold up as a "smoking gun" a memorandum from the 2002 Senate Plan's chief architect. But, as the district court observed, the memorandum actually "assists the defendants at least as much as it assists the plaintiffs because it plainly invokes the permissible policies that *Karcher* contemplates." J.S. 29a. Specifically, the memorandum shows an effort to promote "contiguity, compactness, preserving the cores of existing districts, desiring not to pit incumbents against one another, respecting then-current political subdivisions and county lines, and staying within the ten-percent-deviation parameter of *Brown*." J.S. 28a-29a. "[N]or is it surprising that a memorandum to the Republican State Senat[ors] in control of redistricting would describe a potential Democratic district as comprised of 'undesirable' voters"—who, in any

event, were located in *perfectly* populated (0.03% deviation) districts on *Long Island*, not in "upstate" or "downstate." J.S. 29a-30a.

In this connection, Appellants are either confused or disingenuous about the district court's citation to *Easley v. Cromartie*, 532 U.S. 234 (2001). J.S. 30a. As the court observed, *Cromartie II* established that a mere statistical racial effect (*i.e.*, the mere fact that a plan seems to separate African-American and white voters) does not suffice to show a racial purpose when there is a strong correlation between race and politics. J.S. 30a. Similarly here, the mere fact that "upstate" districts are overpopulated does not suffice to show that the Legislature harbored some "regional" animus against voters based on where they lived. *Id.* ("In New York State, the traditional correlation between 'upstate' districts and Republican political identification (21 out of 24 Senators upstate are Republican) means that the plaintiffs here needed to proffer more than a mere assertion of a Senate conspiracy for 'upstate' ascendancy to meet their burden of showing a violation of the one-person, one-vote principle.").[16] Far from holding that politics justify otherwise impermissible population deviations, the court simply used politics to illustrate why Appellants were unable to prove "regional" discrimination *at all*, much less that such discrimination—instead of any legitimate redistricting principle—was the actual reason for the challenged deviations.

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[16] Nor can Appellants be heard to complain that it is too difficult to prove "regional" discrimination if they are required to show more than the mere existence of regional differences. In light of the strong overlap between race and politics, it is generally *harder* to disentangle politics from race (in order to prove race discrimination) than it is to disentangle politics from alleged "regions." Such disentanglement, however, is clearly necessary to show that race played an impermissible role in redistricting, and even Appellants presumably would not contend that residents of cognizable "regions" receive *greater* protection than racial groups under the Fourteenth Amendment.

Conversely, the fact that there was a correlation between the "upstate" and Republican incumbents does not mean that the Senate Republican majority was precluded from pursuing neutral districting principles which "benefited" that area, or that these legitimate principles became illegitimate because of some political "taint," particularly since there was no identifiable negative effect on any voters or party. Yet, as the district court properly recognized, mindless invalidation of such legitimate plans would be the necessary result of accepting Appellants' theory that even minor deviations supported by neutral redistricting policies somehow become impermissible if they have a beneficial effect on a region or majority party. Establishing a statistical correlation between a party and a region is wholly insufficient to establish an illegitimate purpose or to condemn a plan that plainly advances neutral principles.

In short, since Appellants' case below focused only on alleged "regionalism" instead of politics, their current discussion of the issue—and, relatedly, their reliance on *Larios*—is entirely beside the point. In any event, since Appellants' *entire* "showing" of partisanship consists of the observation that the "upstate" is disproportionately Republican, this case does not provide a vehicle for analyzing the legitimacy of utilizing population deviations as a tool for a cognizable partisan gerrymander.

II. THIS APPEAL DOES NOT PRESENT A LEGISLATIVE PRIVILEGE ISSUE

Appellants also seek plenary review of a series of extraordinarily fact-specific evidentiary rulings on specifically identified documents and witnesses—rulings which were principally based on the idiosyncratic structure of New York State's redistricting task force, and none of which even purport to resolve any question on the scope of legislative privilege. Even if the Court were concerned with such extraordinary minutiae in normal circumstances, the dispositive point here is that the district court never barred a

single deposition of any Senator or legislative aide, and documents were withheld only on the ground that they were irrelevant to the dispute.

Contrary to the jurisdictional statement, the district court did not preclude Appellants from discovery of *any* remotely relevant evidence in this case. With respect to depositions, the district court did not hold that legislative privilege or any other privilege barred the deposition of any witness—including Senator Bruno, other legislators, Mark Burgeson ("the primary drafter of the Plan" (J.S. 10)), or other legislative aides. A perusal of Appellants' appendix confirms that there is no such order and, indeed, reveals the district court's admonition that it was *not* determining the question of "any depositions of legislators or their staffs" and not "determin[ing] whether Senator Bruno, Speaker Silver, and the remaining legislator/defendants are entitled to claim legislative immunity on the facts of this case." J.S. 209a; *see also* J.S. 221a ("It appears that the plaintiffs themselves delayed several fact witness depositions . . . .").

With respect to documents, the district court, over *Appellees'* strenuous objections, ordered the production of *all* requested documents except those that "would add nothing to the discussion of the legality of the Senate majority's final plan." J.S. 214a. Appellants do not and cannot challenge the determination that the protected documents "would add nothing to the discussion." The magistrate identified these documents after careful *in camera* inspection, and Appellants never asked the district court to review the documents or objected to the magistrate's document-specific relevance determinations. Before the district court, Appellants argued only that Senator Bruno had waived legislative privilege and that legislative privilege does not apply to *any* document—regardless of its individual relevance—that "pertains to challenged districts (which could include documents concerning districts adjacent to the

challenged districts)."[17] App. 39a. Accordingly, even if *legislative privilege* does not bar discovery of irrelevant documents, the court's ruling on these documents was correct on relevance grounds alone and, for the same reason, could not possibly have prejudiced Appellants.

In all events, even if the legislative privilege issue were not rendered irrelevant by the irrelevance of the documents themselves, Appellants' arguments lack merit. Appellants contend (J.S. 25-26) that there is never *any* legislative privilege for state legislators. Appellants, however, did not object when the magistrate rejected this argument and held instead that state legislative privilege is governed by a five-part balancing test. They have therefore waived any objection to this standard. Fed. R. Civ. P. 72(a).[18]

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[17] Appellants' one-person, one-vote claim is not district-specific but is based on alleged "regional" discrimination. Thus, Appellants contended only that the withheld documents were needed (regardless of individual relevance) for their Voting Rights Act and Fourteenth Amendment racial gerrymandering claims, none of which is raised in this appeal. App. 38a.

[18] In all events, if legislative privilege does not provide state legislators with complete immunity from discovery in civil actions, it at least protects those matters satisfying the magistrate's five-part test. Contrary to Appellants, the state legislative privilege is "similar in origin and rationale to that accorded Congressmen under the Speech or Debate Clause." *Supreme Court of Va. v. Consumers Union*, 446 U.S. 719, 732 (1980); *cf.* N.Y. Const. art. III, § 11 (speech or debate clause nearly identical to federal counterpart). In addition, Appellants' reliance on criminal cases such as *United States v. Gillock*, 445 U.S. 360 (1980), is misplaced. "Although the separation-of-powers doctrine justifies a broader privilege for Congressmen than for state legislators in *criminal* actions, [citing *Gillock*], [this Court] generally ha[s] *equated* the legislative immunity to which state legislators are entitled under § 1983 to that accorded Congressmen under the Constitution." *Supreme Court of Va.*, 446 U.S. at 733 (emphasis added). For legislators at all levels, moreover, the privilege extends to discovery as well as personal liability. *See, e.g., Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998) ("[I]t simply is not consonant with our scheme of government for a court to inquire into the motives of legislators." (internal quotation marks omitted)).

Appellants also argue that the magistrate judge did not "actually perform[] . . . a balancing analysis." J.S. 26. The record is clearly to the contrary (*e.g.*, J.S. 213a-216a), as Appellants previously have *conceded*. App. 29a ("Judge Maas engaged in a sensitive balancing of Senator Bruno's claimed need for secrecy and Plaintiffs' competing need for disclosure."); App. 31a ("Overall, Plaintiffs believe that Judge Maas's privilege rulings fairly and appropriately balanced the parties' competing interests, as he was required to do by the qualified privilege standard that governs this case.").

Appellants also cite *Powell v. Ridge*, 247 F.3d 520 (3d Cir. 2001), and claim that Senator Bruno "waived" legislative privilege by "willingly participat[ing] in the litigation." J.S. 28. But *Powell*, in which the legislators *intervened*, is precisely the opposite of this case, in which the legislators were *sued* by Appellants.[19]

Finally, Appellants argue that Fed. R. Civ. P. 26(a)(2)(B) and (b)(4)(B) required disclosure of all information known to expert witness Mark Burgeson, including the confidential legislative deliberations of State Senators and their aides. This is an extraordinarily odd argument because, again, the district court did not bar questioning of Mr. Burgeson at any of his *three* depositions or at trial. Appellants were free to ask any questions they desired, and they never sought to compel an answer on the ground that it had not been given or was incomplete. Thus, Appellants' assertion that the designation of Mr. Burgeson as an expert "opened up" a line

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[19] Appellants' appendix includes only one mention by the magistrate of the waiver argument. J.S. 202a-203a. Appellants did not object thereto, and the district court expressly stated that the magistrate had not reached the issue. J.S. 209a n.3. The jurisdictional statement does not identify or provide any other ruling or reasoning of the magistrate on the waiver claim. *See* Sup. Ct. R. 14.1(i), 18.3.

of questioning is a *non sequitur*: No line of questioning had been closed by the district court in the first place.

In all events, the questions that Appellants now say they, in retrospect, should have asked Mr. Burgeson as an expert would have been improper because they were well outside the scope of his expert report.[20] Evidence of individual legislators' *subjective* motivations would be wholly irrelevant to any effort by Appellants to challenge Mr. Burgeson's report, which simply identified and explained undisputed, *objective* facts about the various plans—*e.g.*, population deviations under different measures, county breaks, incumbent pairs, and the degree to which each new district encompassed the same population as a prior district. Indeed, the district court relied upon these undisputed facts themselves, rather than on any conclusions drawn by Mr. Burgeson, and the court's judgment thus would have been the same even if the report had been stricken entirely. Finally, Appellants obtained all relevant memoranda by Mr. Burgeson relating to the Legislature's line drawing, as evidenced by their heavy reliance on these memoranda in their summary judgment papers, at trial, and in their jurisdictional statement.

CONCLUSION

The judgment of the district court should be affirmed.

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[20] The district court did not preclude Appellants from deposing Mr. Burgeson as a *fact* witness on the subjective motivation of legislators in drawing district lines. The court only rejected Appellants' argument (App. 46a-47a) that deposition questioning on the subjective motives of legislators and their aides was within the appropriate scope of *expert* discovery. In addition, Plaintiffs only asked the district court to compel deposition testimony—not the production of documents—pursuant to the expert discovery rules. App. 47a.

Respectfully submitted,

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